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**TRANSCRIPT OF PROCEEDINGS**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**IN THE MATTER OF:**

**EB DOCKET NO. 04-381**

**FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., ET AL.**

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

IN THE MATTER OF

FLORIDA CABLE TELECOMMUNICATIONS  
ASSOCIATION, INC.; COMCAST  
CABLEVISION OF PANAMA CITY, INC.;  
MEDIACOM SOUTHEAST, L.C.C.; AND  
COX COMMUNICATIONS GULF, L.C.C.,

Complainants,

v.

GULF POWER COMPANY,

Respondent.

EB Docket No.  
04-381

VOLUME 5

Federal Communications  
Commission  
Hearing Room A, TW A-363  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C.

Monday,  
April 10, 2006

BEFORE:

THE HONORABLE RICHARD L. SIPPEL  
Chief Administrative Law Judge

**\*\*CORRECTED EXHIBIT PAGES  
344 AND 345 ATTACHED\*\***

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E X H I B I T S

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10	374	374
11 and 12	377	377
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<u>Number</u>	<u>For Identification</u>	<u>In Evidence</u>
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Complainants:

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Start Time: 9:38 a.m.

End Time: 3:47 p.m.

P R O C E E D I N G S

(9:38 a.m)

JUDGE SIPPEL: On the record.

Has everybody given their appearances to the court reporter? Okay. Well, I'm going to skip the formalities this morning if that's okay and get right down to some business.

This is the first day of hearing in the case of Florida Cable Communications Association, Inc., et al, Complainants, v. Gulf Power Company, CB Docket No. 04-381.

The purpose for today's proceeding is limited solely to documents, and I understood coming in, I spoke with my administrative officer, Ms. Gosse, and she said that you had some questions, and the answer is yes, and you would figure out the logistics with Ms. Gosse and whoever else does logistics around here.

Now, we get right to the heart of the matter, which is the documents, and the way I intend to proceed is to first start with Gulf Power documents and finish with them, and then move over to the

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1 Complainant's documents.

2 I want to keep this to -- well, I'll have  
3 to see how it goes along, but a minimal of objections  
4 and a minimal of arguments. I think that evidence in  
5 one sense, it seems to me, is very clean evidence in  
6 the sense that it's basically business documents, and  
7 you know, they are pretty noncontestable on their  
8 face, at least as far as admissibility is concerned.  
9 They're reliable and they're genuine. This is not  
10 being challenged. So I'm hoping that we don't have  
11 too much of a problem.

12 But let me start. Let me start with Gulf  
13 Power and ask counsel how you want to proceed on this.  
14 Your first volume is Notebook 1 of 5; is that correct?

15 MR. LANGLEY: Yes, Your Honor.

16 JUDGE SIPPEL: Is that how you want to  
17 proceed?

18 MR. LANGLEY: I think that makes sense.

19 JUDGE SIPPEL: Okay.

20 MR. LANGLEY: Did you want to take this  
21 exhibit by exhibit or did you want to --

22 JUDGE SIPPEL: I want to talk about that.



1       that's a good question. I wanted to see how. The  
2       court reporter has a list of the documents, and these  
3       are tabbed. I can see in the first volume, for  
4       example, you've only got one tab. It's all in one.  
5       So that should go pretty quickly.

6               It's just a question of marking the first  
7       page of the exhibit. The reporter, whatever stamp,  
8       whatever designation you use, indicate that it's being  
9       identified and received and we move on from there.

10              My method is generally that, to have the  
11       first page of the document stamped, identify the  
12       number of pages, offer it, have it received, and then  
13       move on to the next one. It should go fairly rapidly,  
14       I hope.

15              MR. LANGLEY: Would it be acceptable to  
16       maybe just ask what the first document is where  
17       there's an objection and then we can go back and say  
18       the first document they object to is four? We could  
19       just receive one through three and do four?

20              JUDGE SIPPEL: Well, that's a good idea.  
21       I mean, that's a good idea. We can go off the record  
22       while the reporter marks them and does whatever he

1 needs to do to be sure that -- I mean, I'd like to be  
2 able to do it volume by volume, but I've really got to  
3 do it document by document.

4 Let me ask that question of Mr. Seiver.  
5 Are there any of these documents that you're going to  
6 object to?

7 MR. SEIVER: Yes, Your Honor, and in fact,  
8 Volume 1 I think is only one exhibit. The problem is  
9 both with their first three exhibits, is the opening  
10 document in that exhibit, the opening pages are an  
11 affidavit of Mr. Dunn, who has submitted direct  
12 testimony in this case and as I understand will be  
13 appearing at the hearing, and his deposition was  
14 taken.

15 But it seemed to me that the affidavits  
16 themselves had no independent admissibility when being  
17 offered by counsel for the proponent of that witness,  
18 as straight hearsay. If he needs to testify to  
19 something, he'll testify to it. If he doesn't, he  
20 doesn't. But I didn't think that bringing in his  
21 affidavit, even though at least one or more of them  
22 were asked at deposition, had anything to do with the

1       evidentiary rules for permissible admission.

2                   And what was attached to Mr. Dunn's  
3       affidavit, and I apologize for not having done this --  
4       sorry for the time -- a lot of the exhibits that are  
5       attached, not every one of them are very duplicative  
6       of other exhibits, of either pole attachment  
7       agreements or the plates, other cases. I mean, it is  
8       not really a business document. It was something that  
9       was filed in the earlier part of this case, and we  
10      have had a discussion about what would be admitted as  
11      an exhibit in this case from the prior proceedings in  
12      this case.

13                   And there are targeted items from the  
14      earlier proceedings that we want to make exhibits, but  
15      something like this that comes in that is basically a  
16      disjointed, you know, three inch thick document that  
17      contradicts or maybe varies from other exhibits that  
18      we don't have a problem being admitted and with it  
19      being an affidavit seemed inappropriate.

20                   JUDGE SIPPEL: What's the nature of the  
21      affidavit?

22                   MR. CAMPBELL: If I could respond to that,

1 Russ Campbell, Your Honor.

2 JUDGE SIPPEL: Mr. Campbell, yes, sir.

3 MR. CAMPBELL: There were at least a  
4 couple of reasons that this affidavit should be  
5 admitted into evidence. The first relates back to the  
6 FCC's procedural rules. As we read them, Mr. Dunn is  
7 going to be a witness in the case. He has offered  
8 direct testimony, and Rule 1.362 says that after a  
9 witness is called and has given direct testimony in a  
10 hearing and before he is excused, any party may move  
11 for the production of any statement of such witness,  
12 and then that should be offered into evidence.

13 By offering it as one of our exhibits, we  
14 are, of course, so moving. The reason it should come  
15 in is Mr. Dunn directly refers to those previous  
16 affidavits in this proceeding as the bases for some of  
17 his testimony.

18 In order not to have to recapture pages  
19 and pages of explanations, he simply referred back to  
20 the previous affidavit in this proceeding and some of  
21 the attachments to those affidavits.

22 JUDGE SIPPEL: All right. Well, I've

1 heard enough on this. Now, what about the character  
2 of the exhibit itself? It has been characterized by  
3 Mr. Seiver as disjointed.

4 MR. CAMPBELL: Yes. I don't know where  
5 the disjointed comes from. It is the complete  
6 affidavit with all of the attachments that were  
7 submitted to this proceeding, and I might add that  
8 some of those attachments are actually referred to on  
9 Complainant's exhibit list, and so in the interest of  
10 completeness, it would seem to me that we need the  
11 entire affidavit with its attachments in evidence in  
12 the case.

13 JUDGE SIPPEL: Well, I'm satisfied. I  
14 know that this is -- and, Mr. Seiver, you'll have to  
15 bear with me -- this is not going to be -- we don't  
16 achieve perfection here. We achieve substantial  
17 compliance with every rule or every consideration  
18 that's pertinent to it, and the most pertinent is my  
19 feeling with respect to the evidence.

20 By virtue of the fact that Mr. Dunn is  
21 going to be here, if there is anything in the  
22 affidavit that's inappropriate, you'll have a chance

1 to either cross examine or move to have it stricken,  
2 and that goes true of all of these documents.

3 I'm going to be rather lenient in terms of  
4 receiving them into evidence just because of the  
5 logistical and the time constraints. But you always  
6 have an opportunity of moving to strike, and as we get  
7 into the actual hearing itself, things can be fleshed  
8 out better than they are today.

9 So anyway, that's my ruling. My ruling is  
10 that this can be received into evidence. The  
11 objection is overruled. The reporter will mark this  
12 for identification as what? Somebody give me a name.

13 MR. CAMPBELL: Gulf Power Exhibits 1, 2  
14 and 3.

15 JUDGE SIPPEL: All right. Gulf Power 1,  
16 2, and 3 are marked for identification, and you're  
17 moving them into evidence at this time?

18 MR. CAMPBELL: Yes, Your Honor.

19 JUDGE SIPPEL: Okay. Subject to objection  
20 by counsel, Mr. Seiver, they are received into  
21 evidence.

22 (Whereupon, the documents

1 referred to were marked as Gulf  
2 Power Exhibit Nos. 1 through 3  
3 for identification and were  
4 received in evidence.)

5 JUDGE SIPPEL: Thank you.

6 MR. SEIVER: Your Honor, could I request  
7 one clarification? As far as the affidavit itself  
8 being testimony of Mr. Dunn, I would ask that it --  
9 and maybe this will be fleshed out during cross  
10 examination -- that it is not the same as his direct  
11 testimony as far as the consideration put forth.

12 JUDGE SIPPEL: I'll be able to follow  
13 that. I'll be able to follow it. You know, this is  
14 Dunn's testimony, the affidavits, and correspondence  
15 and Christmas cards. Whatever it is isn't going to  
16 really come into focus until you come up with proposed  
17 findings.

18 As long as he's testifying to what's  
19 relevant to the issues and is qualified to testify,  
20 that's my main concern. But I certainly will permit  
21 you, you know, leeway in your cross examination to  
22 explore the areas that are giving you concern.

1 MR. SEIVER: That brings up one more  
2 thing, and maybe if we get this resolved now that will  
3 make the rest of the morning go a lot faster, Your  
4 Honor, on relevance. One of our objections had been  
5 during the earlier stages of the proceeding is that  
6 the evidence that Gulf Power had described when it was  
7 seeking rehearing and then itemized and then discussed  
8 during the process of what was going to be submitted  
9 we believe is not tied into the APCo test.

10 And in fact, Mr. Dunn's prior affidavits  
11 were done before the APCo decision had been rendered,  
12 and then subsequent to the APCo decision, both at the  
13 FCC's review of the APCo complaint and then the  
14 Eleventh Circuit, standards were set which we believe  
15 none of the evidence that's being proposed by Mr. Dunn  
16 in his direct testimony or his affidavits complies  
17 with it.

18 Now, if Your Honor would prefer to have  
19 Mr. Dunn on the stand and we go through it and then  
20 make that argument that way, but the replacement cost  
21 methodology, for example, had been expressly rejected  
22 by the APCo court or APCo at the Commission, which was



1 affirmed on appeal in the Eleventh Circuit, and that  
2 the very narrow issue for this proceeding was whether  
3 a pole is at full capacity and there's a demonstrated  
4 lost opportunity, that somehow or other there's excess  
5 of marginal cost, which this has got to do with  
6 replacement cost, nothing to do with marginal cost.

7 This might be an issue that the court will  
8 be hearing ad nauseam from the different witnesses,  
9 but I wanted to make my objection clear at the  
10 beginning that as to relevance of the replacement cost  
11 and everything else.

12 JUDGE SIPPEL: I don't want to spend a lot  
13 of time on this this morning. This is exactly what  
14 I'm trying to avoid.

15 Certainly, if you want to point out your  
16 inconsistencies or with respect to the APCo case in  
17 this testimony, fine. You know, the record will so  
18 reflect. If it's bad enough to strike, I'll grant  
19 your motion to strike.

20 We're not going to spend an awful lot of  
21 time on that.

22 MR. SEIVER: Well, Your Honor, that was

1 just my overall -- that objection permeates all of the  
2 testimony of Gulf Power and their exhibits because it  
3 all is based on not showing a lost opportunity and  
4 valuing the lost opportunity, but through a  
5 replacement cost model for valuing a pole --

6 JUDGE SIPPEL: Well, as I say, both sides  
7 will have the opportunity, you know, to just  
8 completely cut the other side's position apart in  
9 proposed findings. I'm relying on you all to educate  
10 me in terms of what is and what isn't important to  
11 you.

12 I can determine relevance with respect to  
13 that Eleventh Circuit decision, but, you all have to  
14 tell me what you're relying on. And if he's relying  
15 on things that you feel are just completely off base  
16 as far as the Eleventh Circuit is concerned, you're  
17 going to let me know that.

18 MR. SEIVER: Very well, Your Honor. I  
19 just wanted to make sure that the objection was noted.

20 JUDGE SIPPEL: All right. So noted.

21 Now, I may have moved a little bit too  
22 quickly on that. That was Exhibit 1 and how many

1 volumes do we have in Exhibit 1?

2 MR. LANGLEY: Your Honor, there were  
3 actually three exhibits that were Mike Dunn  
4 affidavits. They were one, two, and three.

5 JUDGE SIPPEL: Yes.

6 MR. LANGLEY: One has most of the  
7 attachments to it. Two and three are shorter  
8 affidavits and maybe even no attachments. John  
9 probably knows, but I think that -- I don't mean to  
10 speak for John -- but I believe his objections were --

11 JUDGE SIPPEL: You mean Mr. Seiver?

12 MR. LANGLEY: Yes, Mr. Seiver. I'm sorry.

13 I didn't mean to speak for Mr. Seiver, but  
14 I think his objections covered all three affidavits.

15 MR. SEIVER: That is correct, Your Honor.

16 JUDGE SIPPEL: No, but what is being  
17 identified as Gulf Power Exhibit No. 1 as far as pages  
18 is concerned, volumes is concerned?

19 MR. CAMPBELL: It's Volume 1 of the five-  
20 volume set, is Exhibit 1.

21 JUDGE SIPPEL: Okay.

22 MR. CAMPBELL: Correct, and then Tabs 2

1 and 3 are in Exhibit 2, are in Notebook No. 2 of 5.

2 JUDGE SIPPEL: Do you know how many actual  
3 pages are in the exhibit?

4 MR. CAMPBELL: We can deduce that from the  
5 Bates numbers.

6 JUDGE SIPPEL: Okay. Well, you don't have  
7 to do it right now, but would you do it with the  
8 reporter off the record so that he has a list that  
9 says not only what the exhibit is in terms of how  
10 you're identified it, but also the number of pages in  
11 the exhibit because these documents are going to go  
12 into wherever they go over here with Dockets, and  
13 we're going to have to count pages.

14 Okay. Now, direct me now to the next  
15 exhibit that you want to introduce.

16 MR. LANGLEY: Gulf Power Exhibit 4, Your  
17 Honor.

18 JUDGE SIPPEL: And is that in a separate  
19 volume?

20 MR. LANGLEY: It is not. It is part of  
21 Volume 2.

22 JUDGE SIPPEL: Do you have it marked as

1 Volume 2 or is it just the second volume?

2 MR. LANGLEY: It is marked as Volume 2 of  
3 5 -- excuse me -- Notebook 2 of 5.

4 JUDGE SIPPEL: Excuse me. Volume 2, I  
5 have -- oh, those are Complainant's exhibits. I'm  
6 sorry.

7 Okay. I've got it. Gulf Power Exhibit 2  
8 of 5, Notebook 2 of 5, correct?

9 MR. LANGLEY: Yes.

10 JUDGE SIPPEL: Okay. Let's go. Do you  
11 want to identify the exhibit and the purpose for which  
12 it's being offered?

13 MR. LANGLEY: If Your Honor requests.  
14 This is a composite exhibit which includes Gulf  
15 Power's cable TV permitting procedure, as well as a  
16 complete set of the CATV permit records from 1999  
17 through the end of 2005.

18 JUDGE SIPPEL: Okay. And the purpose for  
19 which this is being offered?

20 MR. LANGLEY: This shows the first part of  
21 the exhibit, which is the CATV permitting procedure,  
22 establishes the process by which the Complainants

1 attach to Gulf Power's poles.

2 The second part of the exhibit deals with  
3 -- essentially is a record of all of the permit sought  
4 by the various attachers in Gulf Power's service  
5 territory, including, but not limited to, the  
6 Complainants.

7 I don't know that this is the subject of  
8 objection though. I think they have marked --

9 JUDGE SIPPEL: Well, wait. Before we get  
10 to that, excuse me, I need to interrupt. I just want  
11 to understand what the exhibit is and what it is that  
12 you're offering it, for what purpose you're offering  
13 it. That's all.

14 And then Mr. Seiver will get his chance to  
15 address it. I have a volume here that says it's Gulf  
16 Power's Notebook 2 of 5, and there are I count 11 --  
17 I'm sorry -- Tabs Nos. 2 through 11.

18 MR. LANGLEY: Correct, and we're dealing  
19 with Tab 4.

20 JUDGE SIPPEL: Two and three were part of  
21 Exhibit --

22 MR. LANGLEY: Two and three were the

1 second and third affidavits of Mike Dunn. Exhibits 1,  
2 2, and 3 are all affidavits of Mike Dunn.

3 JUDGE SIPPEL: Okay. It just happens to  
4 be in a different volume.

5 MR. LANGLEY: That's correct.

6 JUDGE SIPPEL: Two and three are in a  
7 different volume.

8 MR. LANGLEY: Yes.

9 JUDGE SIPPEL: So we're picking up with  
10 four here.

11 MR. CAMPBELL: It might help, Your Honor,  
12 if we step back for a minute and talk about how we  
13 compiled the notebooks because there appears to be  
14 some confusion about that. Consistent with the  
15 scheduling order, what we have done is identify each  
16 exhibit that is on our exhibit list with a tab that  
17 corresponds to the exhibit number. So Tab 1 in Volume  
18 1 of the notebook was Exhibit 1. Tab 2 in the second  
19 volume of exhibits is Exhibit 2, and so they are  
20 numbered by exhibit numbers, and it just so happened  
21 that Exhibit 1 was so thick it covered an entire  
22 notebook.

1           Exhibit 2 is right here, and now we're on  
2           Exhibit 4. So we understand that one through three  
3           are already in. We're now on Exhibit 4.

4           JUDGE SIPPEL: Okay. Well, does the  
5           reporter -- do you understand that?

6           So as far as my instructions are  
7           concerned, you've been instructed to mark and receive  
8           into evidence Exhibits Nos. 1, 2, and 3 up to this  
9           point, and we know where they are, and you know that  
10          you're going to have to account for the number of  
11          pages in the individual exhibit.

12          MR. CAMPBELL: Yes, Your Honor. And I  
13          might suggest on that because this is going to be a  
14          problem with Complainant's exhibit as well, they have  
15          three notebooks. We have five. We've got eight  
16          notebooks to ID the pages on. It might be helpful if  
17          we do that after we leave the hearing and resubmit  
18          that --

19          JUDGE SIPPEL: Yes.

20          MR. CAMPBELL: -- to the court reporter --

21          JUDGE SIPPEL: Yes.

22          MR. CAMPBELL: -- by exhibit number, total



1 of pages.

2 JUDGE SIPPEL: Yes. You've thrown me a  
3 life preserver. Absolutely. I am expecting that this  
4 will be done the right way by counsel and the staff,  
5 and we can do it off the record. We can do it during  
6 lunch. We can do it after we're finished here today,  
7 you know. I leave that -- really, I appreciate that  
8 very much.

9 MR. CAMPBELL: Mr. Seiver and Mr. Cook, is  
10 that okay?

11 JUDGE SIPPEL: Let's just keep moving. I  
12 do appreciate that.

13 So we've got Gulf Power No. 1, Gulf Power  
14 No. 2, Gulf Power No. 3 is in. Now we're under Gulf  
15 Power No. 4, which is in Volume 2, and this says CATV  
16 permitting procedure. Okay, and we have already  
17 gotten an explanation on that; is that right?

18 MR. LANGLEY: Yes, Your Honor. We move to  
19 admit.

20 JUDGE SIPPEL: Any objection? Subject to  
21 your other objection.

22 MR. SEIVER: Yes, Your Honor. No

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